IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4395 OF 2005

Mrs.Indravati Rajan Yadav)
Indian Inhabitant, of Bombay)
Aged 30 years, Occ : House-wife)
residing at Road No.4, Motilal)
Yadav Chawl, Iraniwadi, Kandivali)
(West), Mumbai 400 067.) ..Petitioner.

Vs.

1. Shantidevi Kamleshkumar Yadav)
(Congress - I Candidate))
residing at Jaihind Seva Society)
Opp. Gandhi Vidya Mandir,)
Sanjay Nagar, Lalaji Pada,)
Kandivali (W), Mumbai 400 067.)

2. Mrs.Bimla Achhelal Yadav)
(Samajwadi Party Candidate))
Residing at Santoshi Chawl)
Committee, Sanjay Nagar,)
Exta Magar, Kandivali (West))

Mumbai 400 067.)

3. Municipal Corporation for Greater)
Mumbai, a body incorporation)
under the provisions of BMC Act)
1888, having its head office at)
Mahapalika Bhavan, Mahapalika)
Marg, Mumbai 400 001.)

4. State Election Commission)
through Election Commissioner)
Administrative Building,)
Opp. Mantralaya, Mumbai 400 032.)

5. The President,)
Vigilance Committee (Caste)
Scrutiny Committee) Social)
Service Branch, Mumbai Division)
Konkan Bhuvan, Navi Mumbai.)..Respondents.

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Mr.G.R.Sharma i/b Mr.R.G.Bhat for the Petitioner.

Mr.A.J.Bhor for Respondent No.3.

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CORAM : F.I.REBELLO &

DR.D.Y.CHANDRACHUD, JJ.

13th September, 2005.

ORAL JUDGMENT **(Per F.I.REBELLO, J.)**

1. Appearance has been put up on behalf of Respondent No.3. None present for Respondent Nos.1 and 2. Even otherwise considering the order to be passed, notice on them dispensed with. Rule, made returnable forthwith.

2. At the general election held to fill in the seats to Respondent No.3 Corporation, Respondent No.1 was declared elected. The seat was reserved for female (OBC) candidate. An election petition was filed by a voter before the Additional Chief Judge, Court of Small Causes at Mumbai being Election Petition No.30 of 2002. Reliefs sought were to set aside the election of Respondent No.1 and to declare Respondent No.2 as elected. The Petition was allowed and the election of Respondent No.1 was set aside. At the same time, the Learned Additional Chief Judge, Court of Small Causes declared Respondent No.2 deemed to be elected

against the vacancy occasioned by unseating of Respondent No.1. It appears that an objection came to be raised against Respondent No.2 on the ground that she did not belong to the notified OBC caste. The matter for verification of the caste claim of Respondent No.2 was forwarded to the caste scrutiny committee which rejected the claim of Respondent No.2 as belonging to the O.B.C. Caste. Respondent No.2 filed a Petition challenging the said order before this Court being Writ Petition 4272 of 2005. The Petition was dismissed. Consequently, Respondent No.2 ceased to hold office. Counsel appearing for the Petitioner points out that the Petition filed by Respondent No.1 has also been dismissed.

3. It is the case of the Petitioner, that Petitioner ought to have been declared as deemed to be elected pursuant to the vacancy which has been occasioned by the unseating of Respondent Nos.1 and 2. It is on this basis that the present Petition has been filed. It may be mentioned that the Petitioner herein was not a party in the Municipal Election Petition NO.30 of 2002.

4. At the hearing of the Petition, on behalf of the Petitioner learned counsel points out placing reliance on Sections 33 and 34 of the Mumbai Municipal Corporation Act, 1888 (hereinafter referred to as the Act) that she should be declared as deemed to be elected to the seat on account of the vacancy having arisen by the unseating of Respondent Nos.1 and 2. We may gainfully reproduce Section 33(2) of the Act which reads as under :

> "33(2) If the said Chief Judge, after making such inquiry as he deems necessary, finds that the election was valid election and that the person whose election is objected to is not disqualified he shall confirm the declared result of the election. [If he finds that the person whose election is objected to is disqualified for being a councillor be shall declare such person's election null and void. If he finds that the election is not a valid election he shall set it aside. In either case he shall direct that the candidate, if any, in whose favour the next highest number of valid votes is recorded

after the said person, and against whose election no cause of objection is found, shall be deemed to have been elected.]

Similarly Section 34 also needs to be reproduced and it reads as under :

"[34. **Procedure if election fails or is set aside**. - [(1) If at any general election or on election held to fill a casual vacancy, no councillor is elected, or the election of any councillor is set aside under sub-section (2) of section 33 and there is no other candidate who can be deemed to be elected in his place under the said sub-section [the State Election Commissioner] shall appoint another day for holding a fresh election and a fresh election shall be held accordingly.]

(2) A councillor elected under this section shall be deemed to have been elected to fill a casual vacancy under section 9.]"

33(1) requires that when a Petition is filed, disputing the election of a councillor and in case the application is for a declaration that any particular candidate shall be deemed to have been elected, the applicant has to make parties to the application all candidates who although not declared as elected, have according to the results declared, by the State Election Commissioner under Section 32, a greater number of votes than the said candidate. In the instant case, there is no dispute that Respondent No.2 had secured the next highest votes. The Petitioners in the Election Petition also sought a declaration that Respondent No.2 ought to be declared as elected. We then have Section 33(2) which confers the power on the Chief Judge on a finding that the election is not a valid election, to set aside the election and to direct that a candidate if any in whose favour the next highest number of valid votes is recorded, after the said person and against whose election no cause of objection is found, to be deemed to have been elected. A perusal therefore of sub-section (2) would make it clear that it is a power conferred on the Chief Judge in the course of an election petition. In other words, after the Petition has

been disposed of and a declaration is given, it would not be open to the Chief Judge to exercise jurisdiction to declare elected any other person including a person like the Petitioner who contends that he had secured the third highest number of votes. Once that is the case, any order, if had been passed by the Chief Judge subsequent to the disposal of the Petition would be without jurisdiction. In other words, the Petitioner cannot claim to be elected pursuant to a power conferred under Section 33(2).

5. It is, however, the submission on behalf of learned counsel for the Petitioner that a reading of Section 34 of the Act would make it clear that on a vacancy arising on account of disqualification, the next candidate having the highest number of votes will be declared to be elected. Section 34 provides that if at any general election or election held to fill a casual vacancy, no councillor is elected, or the election of any councillor is set aside under sub-section (2) of Section 32 and there is no other candidate who can be deemed to be elected in his place under the said sub section then to hold fresh elections

for the vacancy which has arisen. In the instant case Respondent No.1 was elected at the general election. On his election being set aside, Respondent No.2 was deemed to be elected, pursuant to a prayer in the election petition and the power conferred on a Judge entertaining the election petition to declare the candidate with the next highest votes to be deemed to be declared as elected. This deemed declaration is pursuant to the exercise of a statutory power. There must therefore exist a statutory power in an authority to declare that the Petitioner has been deemed to be declared as elected. There is no statutory power. The issue of the Petitioner being elected under Section 33(2) would not arise because the Election Petition itself had been disposed of and the power is in the Chief Judge to issue a declaration in respect of a party before it. Out side Section 33(2) there is no other power. In other words, in so far as the Petitioner is concerned, no such declaration could have been given. Once that be the case, considering Section 34, the Election Commissioner is mandated to proceed to hold the fresh election for the vacancy which has been occasioned.

6. Considering the above, as there is a vacancy, the Election Commissioner was right in proceeding to fill in the vacancy by holding elections. On behalf of Respondent No.3, learned counsel has produced before us a notification dated 5th September, 2005 whereby nominations have been invited for holding elections to the seat caused on account of the setting aside of the election of Respondent Nos.1 and 2. That being the case, the Petition is devoid of merits. Rule discharged. There shall be no order as to costs.

(F.I.REBELLO, J.)

(DR.D.Y.CHANDRACHUD, J.)